



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Contract Services Co., Inc.
File: B-231539
Date: September 15, 1988

DIGEST

Protest against agency determination to continue in-house performance, based on cost comparison pursuant to Office of Management and Budget Circular A-76, is sustained where the agency used the wrong tax rate in calculating the protester's deduction for federal income tax revenue, and application of the correct tax rate results in the protester's contract cost, with conversion differential, being less than the government's estimate of in-house costs.

DECISION

Contract Services Co., Inc. (CSCI), protests the Department of the Navy's determination to continue in-house performance of various base supply services at the Naval Air Station, Kingsville, Texas, rather than to contract out under request for proposals (RFP) No. N00612-87-R-0288. This determination, made as a result of a cost comparison conducted pursuant to Office of Management and Budget (OMB) Circular A-76, was based upon a projected savings of \$8,389 for in-house performance during the base year and 2 option years. CSCI contends that the Navy in evaluating offers used the incorrect performance period for the base year, that the Navy in calculating CSCI's social security and thrift plan deduction ignored new figures which CSCI had provided to correct a mistake in its offer, and that the Navy used the wrong tax rate in calculating CSCI's deduction for federal income tax revenue. CSCI argues that these errors resulted in a \$36,258 miscalculation; therefore, CSCI's offer is low when compared to the in-house estimate. CSCI's administrative appeal was denied prior to filing this protest.

We sustain the protest on the basis that the Navy applied the wrong tax rate in its cost comparison evaluation.

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The RFP, issued as a small business set-aside, sought offers for a firm-fixed-price contract to perform base supply services at the Naval Air Station, Kingsville, Texas. The RFP advised offerors that the agency would make a cost comparison between the lowest technically acceptable proposal and an estimate of the cost of government performance, and would award a contract if the comparison indicated that contract performance would be more economical.

The Navy found that CSCI's proposal was the most advantageous to the government. On March 9, 1988, the Navy conducted a cost comparison of CSCI's proposal to the government's estimated in-house costs which showed that CSCI offered to perform the required services for \$54,051 less than the government's in-house estimate. CSCI was notified by the Navy that the cost comparison favored performance by the protester.

On March 16, 1988, the Chief of Naval Operations (CNO) directed the activity to revise the government's in-house estimate for this solicitation to reflect new, lower retirement factors for the Navy's civilian employees, and to conduct a new cost comparison. Based upon this revised cost comparison, the agency found that the services could be performed by government personnel for \$3,240,313 which is \$8,389 less than CSCI's evaluated cost (including conversion differential) of \$3,248,702.

Our Office will review protests concerning agency decisions to continue performing services in-house instead of contracting for them, solely to ascertain whether the agency adhered to the established procedures for the comparison of in-house/contracting costs. A protester challenging a cost comparison must demonstrate a failure to follow established procedures and also that this failure had a material effect upon the outcome of the cost comparison--that is, a clear showing that the result likely would have been different had the improper calculation or other procedural error not been made. Atlantic Marine Services, Inc., 66 Comp. Gen. 54 (1986), 86-2 CPD ¶ 446.

CSCI contends that the Navy used the wrong tax rate in computing the estimated amount of federal income tax to be deducted from the cost of contracting, and that if the proper tax rate were applied CSCI's contract cost would be less than the government's estimate of in-house performance.

The OMB Cost Comparison Handbook provides that since contract performance would provide the contractor with income subject to tax, an estimated amount of such taxes should be deducted from the net cost to the government,

unless the prospective offeror is a tax exempt organization. To simplify this computation, the Handbook contains a table which provides, by type of industry, the tax rates to be used in determining the amount of the deduction. To calculate the amount of estimated federal income tax, the agency selects the industry code in the Handbook table which most closely describes the solicitation requirements. The applicable tax rate for that code is then multiplied by the contract price on line 7 of the Cost Comparison Form (CCF) to determine the estimated amount of federal income tax to be entered on line 12 of the CCF as a deduction from the cost of contracting.

To calculate the estimated amount of federal income tax, the Navy chose code 80-57-8980 (miscellaneous services, not elsewhere classified), with a tax rate of 1.2 percent. The Navy states that it chose this code because no other code specifically described the required RFP services. CSCI argues that two other OMB Handbook codes, with higher tax rates, more closely describe the required RFP services. CSCI states that either code 50-30-4200 (trucking and warehousing) or code 80-54-7389 (business services, except advertising) should have been used.

In choosing the appropriate code, procuring officials have a reasonable degree of discretion, and we will examine the agency's choice only to ensure that it had a reasonable basis. Fischer & Porter Co., B-229764, Mar. 17, 1988, 88-1 CPD ¶ 279. However, from our review of the RFP performance work statement, we cannot conclude that the Navy acted reasonably in concluding that the code representing miscellaneous services was the most appropriate one to apply here.

The RFP provides that the "general supply services consist of Warehousing; Customer Support Services; and Traffic Management, including shipping, receiving, delivery, packing and crating. Additionally, the contractor shall provide the care and handling necessary to prevent damage to material from acceptance until issued or shipped, and shall maintain auditable records and associated files on all material." We find that the primary services of this solicitation are warehousing and trucking, and code 50-30-4200, with a tax rate of 1.7 percent, most closely describes the required services. Furthermore, we note that the Standard Industrial Classification manual, published by the Department of Commerce, describes the services under the Navy's classification of "miscellaneous services not elsewhere classified" as those provided by "[e]stablishments primarily providing services, not elsewhere classified, such as authors, lecturers, radio commentators, songwriters, weather

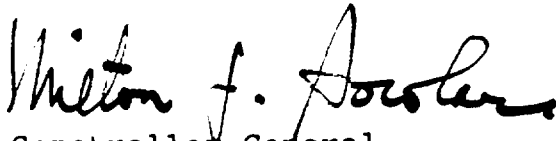
forecasters, writers, and artists working on their own account." In our view, these kinds of services bear no reasonable relationship to the services required by the RFP.

Applying the tax rate for code 50-30-4200 to the calculation of CSCI's estimated federal income tax, the amount of CSCI's deduction to be included on line 12 of the CCF should have been \$55,530, and when this figure is deducted from CSCI's contract cost, CSCI's total contract cost, with conversion differential, is \$16,331 less than the government's in-house estimate. Accordingly, contract performance by CSCI would be more economical than in-house performance, and CSCI should have been determined to be the winner of this Circular A-76 competition.

Because we have resolved CSCI's protest on this issue, we need not consider the protester's other grounds of protest. By letter of today to the Secretary of the Navy, we are recommending that the agency revise its cost comparison and if otherwise proper, award CSCI a contract based upon its lower proposed cost.

We also find the protester to be entitled to its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988). CSCI should submit its claim for such costs directly to the Navy. 4 C.F.R. § 21.6(e).

The protest is sustained.

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